IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1081

MAJOR ADOLPH H. KNEHANS, JR.,

Petitioner,

v.

CLIFFORD L. ALEXANDER
Secretary of the Army,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Major Adolph H. Knehans, Jr. petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia denying petitioner's request to set aside his discharge from the Army and to order his reinstatement.

OPINIONS BELOW

The opinion of the District Court is reported at 403 F Supp. 290, sub nom, *Knehans v. Callaway*. It is reproduced in Appendix A hereto. The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix B hereto.

JURISDICTION

The judgment sought to be reviewed was entered on October 3, 1977 (Appendix C). A timely petition for rehearing was denied on November 3, 1977 (Appendix D), Circuit Judge Robinson dissenting. The jurisdiction of the Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Army can validly discharge an Army officer on the ground of having been twice passed over for promotion even though the statutory procedure prescribed by Congress has not been followed.

2. May a District Court Judge excuse the failure of the Army to follow the statutory procedure prescribed by Congress for the elimination of Army officers, on the ground that in his judgment the petitioner's Army record did not justify his promotion in any event.

3. Can the decision of an Army Board for Correction of Military Records which refused to grant petitioner relief despite an admittedly material error in his records be upheld as not arbitrary and capricious in the absence of any findings of fact by the Board or any statement as to the reasons for its decision.

STATUTES INVOLVED

10 U.S.C. §1552 provides in pertinent part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . .

10 U.S.C. §3297 provides:

(a) Under such regulations as he may prescribe, the Secretary of the Army shall detail selection boards, to meet at times prescribed by him, to recommend promotion-list officers and brigadier generals of the Regular Army for promotion in the Regular Army. Each board shall be composed of at least five officers of the Regular Army who hold a regular or temporary grade above lieutenant colonel, and who are senior in regular grade to, and who outrank any officer considered by that board. . . .

(b) No selection board may serve longer than one year and no member may serve on two consecutive boards for promotions to the same grade, if the second board considers any officer considered but not recommended for promotion by the first.

(c) Each member of a selection board must swear that he will perform his duties without prejudice or partiality, having in view the special fitness of officers and the efficiency of the Army.

(d) Except as otherwise provided by law, promotion-list officers and brigadier generals of the Regular Army may be promoted to the regular grades of captain through major general only when recommended by a

selection board. A recommendation for promotion must be made by the majority of the total membership of the board. Notwithstanding any other provision of law, a board that is to recommend officers for promotion whom it considers to be the best qualified may recommend only those officers whom it also considers to be fully qualified.

(c) Not later than 10 days after a board first meets, any officer eligible for consideration by that board is entitled to send a letter, through official channels, calling attention to matters of record in the Department of the Army concerning himself that he considers important. The letter may not contain any reflection upon the character, conduct, or motives of any officer, or criticism of any officer.

10 U.S.C. §3303 provides:

(a) In this subtitle, "deferred officer" means a promotion-list officer considered for promotion to the grade of captain, major, or lieutenant colonel under section 3299 of this title, but not recommended for promotion.

(b) The years of service with which a deferred officer is entitled to be credited for promotion purposes shall be reduced so that one year after the date on which he would have been promoted had he been recommended by a selection board he will not have more than 7, 14, or 21 years of service, if in the grade of first lieutenant, captain, or major, as the case may be.

(c) A deferred officer shall be considered again by the next selection board considering officers of his grade and promotion list. If recommended by this board, his name shall be placed on the applicable

recommended list with the other officers recommended by the board, in the same order among themselves as on the promotion list, but below officers placed on that list by an earlier board. If a deferred officer is promoted upon the recommendation of the next board considering officers of his grade, his first failure does not count as a failure of selection when he is thereafter considered for promotion to another regular grade.

(d) A deferred officer who is not recommended by the next selection board considering officers of his grade and promotion list shall –

(1) if he is eligible, be retired under section 3913 of this title; . . .

(3) if he is not eligible for retirement under section 3913 of this title or any other provision of law, be honorably discharged on such date as may be requested by him and approved under regulations to be prescribed by the Secretary of the Army, but not later than the first day of the seventh calendar month after the Secretary approves the report of that board, with severance pay computed by multiplying his years of service, but not more than 12, computed under section 3927(a) of this title, by two months' basic pay of the grade in which he is serving on the date of his discharge. However, no person is entitled to severance pay under this section in an amount that is more than $15,000. . . ."

STATEMENT OF THE CASE

1. The Proceedings in the Army

Petitioner, a major in the regular army, was twice passed over for promotion by Army Selection Boards. These Selection Boards are set up under Congressional mandate, 10 U.S.C. §3297, with the proviso that any

Army Officer who is passed over for promotion by two successive statutory Selection Boards shall, if not eligible for retirement, be honorably discharged. 10 U.S.C. §3303(d). Petitioner's second pass-over was approved by the Secretary of the Army on April 24, 1973, thus making petitioner subject to mandatory discharge on November 1, 1973, and petitioner was so advised. The letter of advice stated that "The [Selection] board impartially considered the entire record of each officer, including efficiency ratings, comments on efficiency reports, schooling, commendations and types of assignments."

Petiitioner, who was stationed in Germany at the time, sought legal advice in an effort to challenge the legality of his pending discharge. His counsel's inquiry as to his status was responded to by the Chief of the Promotion Board of the Army on August 3, 1973, as follows (emphasis supplied):

> Dear Mr. Collins:
>
> This is in reply to your inquiry regarding the promotion status of Major Adolph H. Knehans, Jr., 448-38-4175, Corps of Engineers.
>
> The law requires that the promotion of officers on active duty be made on a fair and equitable basis and that selection be based on ability and efficiency as well as seniority and age. The selection of officers for promotion is accomplished by selection boards staffed with mature and experienced officers. They review the overall record and manner of performance of each officer, and they compare his record with those of other officers being considered. Department of the Army does not prescribe specific qualifications necessary for promotion. Accordingly, no single factor is used by the selection board as a determinant for

> selection or nonselection for promotion. The officers found best qualified are then recommended for promotion by the boards, and the Army places implicit faith in their findings.
>
> In response to your request, *Major Knehans' official military records have been reviewed and evaluated in detail. The review confirmed that his records were properly constituted when viewed by the Department of the Army Selection Boards that adjourned on 18 February 1972 and 22 February 1973 and failed to recommend him for promotion to major, Regular Army. Since his records were without material error when viewed by the aforementioned selection boards*, no basis presently exists to afford him promotion reconsideration.
>
> Under the established policy of the Department of the Army, an officer may be afforded promotion reconsideration only when it is determined that a material error existed in his records when viewed by the regularly constituted Selection Boards. *A material error in an officer's records as viewed by the selection board exists when there is a missing efficiency report that should have been viewed by that particular board, or a major change is made to an efficiency report that was seen by a selection board which failed to recommend an officer for promotion. . . . An officer's official military efficiency file is the primary document furnished the selection boards convened for the purpose of considering officers for promotion. . . .*
>
> *The specific reasons for the decision of the selection board in any individual case are not known outside the board inasmuch as the board is not permitted to divulge such information.* However, a selection board bases its decision on an officer's overall manner of performance and not on any particular period or phase of his career. No

one factor is given overriding consideration. *Since the promotion selection board is prohibited from divulging its deliberations, we can only conclude that, when compared with all officers who were eligible, Major Knehans was not as well qualified as those selected.*

However, petitioner, on examination of his file discovered that, contrary to the letter from the Chief of the Promotion Board quoted above, his file was *not* properly constituted when viewed by the statutory Selection Boards. It did not contain several letters of recommendation and appreciation which should have been included in the file sent to the Selection Boards. Most significantly, it contained an unfavorable Officer Efficiency Report for the period March 22, 1971, to July 16, 1971, which was invalid under Army regulations. The period in question came late in petitioner's career and only a short interval before petitioner's case was submitted to the first Selection Board in February, 1972. For this reason, the Chief of petitioner's branch of Service (the Engineering Branch) found that the inclusion of this invalid report was particularly harmful since it would appear to the Selection Boards that petitioner's performance and career was on a "downward trend", thus carrying considerably more weight than a negative report early in petitioner's career.

On September 17, 1973, the Army ruled that the efficiency report in question was invalid and accordingly removed it from petitioner's official records. But it refused to set aside the action of the statutory Selection Boards which had acted on the basis of this invalid report, or to delay petitioner's discharge scheduled for November 1. Although a finding was made that the error in petitioner's file was *material*, the only relief afforded petitioner was to send his case to a

so-called Standby Advisory Board. This Standby Advisory Board has no statutory basis but is entirely a creation of Army Regulations. (*Infra*, pp. 2a, 18a) Further, this Standby Board was advised that petitioner had been twice passed over by statutory Selection Boards and was scheduled for discharge on November 1, 1973. On October 25, the Standby Board failed to recommend petitioner for promotion and petitioner was in fact discharged on November 1, 1973.

2. The Proceedings in the District Court

Petitioner filed suit in the District Court asking (1) that his discharge be set aside, (2) that the findings of the statutory Selection Boards be vacated, and (3) that his case be resubmitted to Statutory Selection Boards on the basis of a correct and accurate personnel file. On April 18, 1974, the district court, over petitioner's objection, remanded the case to the Army Board for Correction of Military Records (herein called ABCMR) for consideration of petitioner's contentions.[1] The ABCMR is a board of civilians established by the Secretary of the Army pursuant to 10 U.S.C. §1552. Its function is to "correct any military record . . . when . . . necessary to correct an error or remove an injustice". It is given no statutory role in the promotion process. Before the ABCMR the Army took the position that petitioner was not entitled to relief because he had failed to prove that his non-selection for promotion was "solely" because of the inclusion of the invalid efficiency report. According to the Army, petitioner had failed to carry this burden because, "The

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[1]This remand was made on the ground that the ABCMR afforded petitioner an administrative remedy which he was required to exhaust (*infra*, p. 2a).

specific reasons for selection or nonselection of an officer are not known since these reasons are not reported or recorded by the selection boards." The ABCMR denied petitioner any relief. It made no findings of fact and gave no reasons in support of its action, stating only that "insufficient evidence has been presented to indicate probable material error or injustice." The case was then returned to the District Court.

On the return of the case to the District Court, the case was submitted on cross motions for summary judgment. The District Court found that the inclusion of the invalid OER in petitioner's file and the failure to include certain letters of commendation violated army regulations. (*Infra*, p. 5a.) It then posed the issue before it as follows: "The first question before the court, therefore, is whether plaintiff is now entitled to reconsideration by two Selection Boards based upon a properly constituted file, in light of the fact that his file as presented to the prior two Selection Boards was constituted in violation of army regulations." (*Infra*, p. 5a.) Although an affirmative answer to this question would appear to be obvious and required by the precedents in this Court, see *infra* p. 13, the District Court answered it in the negative. It reached this conclusion by the following route. According to the District Court, "it is not enough to find that the Selection Boards violated Army regulations; the plaintiff must further show that the ABCMR acted arbitrarily and capriciously in failing to correct the error of the Selection Boards." (*Infra*, p. 6a.) As noted above, the ABCMR made no findings and stated no reasons for its decision. Nonetheless, the District Court held that petitioner had failed to show that the decision of the ABCMR was arbitrary and capricious, because petitioner

had failed to carry the burden of proving that the error in his file "*necessarily* caused the non-promotion decisions." (*Infra*, p. 10a.) Since the decisions of a Selection Board are discretionary in character, and the members are "prohibited from divulging its deliberations" or setting forth their reasons for nonselection in any particular case, it was of course impossible for the petitioner to meet this burden. The District Court further expressed its own view that petitioner's record was not so outstanding as to justify promotion. (*Infra*, p. 9a.) Further, it dismissed the judgment of the Chief of the Engineering Branch that the invalid negative OER was a significant factor in petitioner's non-promotion on the ground that the Engineering Branch was not the Selection Board, and it did not appear that the Selection Boards, which, as noted, gave no reasons for its decisions, placed the same significance on the invalid OER as did the Chief of the Engineering Branch. (*Infra*, p. 9a.)

3. The Decision of the Court of Appeals Below

The Court of Appeals affirmed by a divided opinion, Judge Robinson dissenting. Petitioner's contention, that the admitted violation of Army regulations invalidated the decisions of the Statutory Selection Boards not to promote and petitioner's consequent discharge, was dismissed by the majority with the following comment: "Fortunately, we are not required by the circumstances presented here to accept this extreme position, interfering as it would with personnel matters better left in most cases to the discretion of the military . . . , for he is entitled to no such relief either by statute or regulation." (*Infra*, pp. 17a - 18a.) This view, of course, is completely contrary to the normal rule that an agency's violation of its own regulations invalidates

the agency action. See *infra*, p. 13. So far as the action of the ABCMR was concerned, the majority stated only that it agreed with the district court's conclusion that the petitioner "had failed to sustain his burden of proof" that the decision of the ABCMR was "arbitrary, capricious or otherwise unlawful." (*Infra*, p. 20a.)

REASONS FOR ALLOWING THE WRIT

1. The military persuades its officers to make a career of military service with the assurance that satisfactory performance will result in advances in rank and, after the requisite number of years, retirement. To be sure, officers are also informed that as they advance in rank, they will be competing with their peers for further advancement, and their failure to advance at that stage will lead to their elimination. But none of this is to be done arbitrarily or as a matter of caprice. This method of selection out is required to be done in accordance with a precise procedure prescribed by Congress providing that an officer will be released from the service if he is twice passed over for promotion by Statutory Selection Boards. According to the Army this procedure is "fair and equitable" because the "selection of officers for promotion is accomplished by selection boards staffed with mature and experienced officers" who review and evaluate in detail "properly constituted" military records, and "the Army places implicit faith in their findings."

But this procedure is "fair and equitable" only if the decisions of the Statutory Selection Boards are based upon accurate records of the officer's career performance. The petitioner here has been told that his records as presented to the statutory selection boards contained "material" error; but that he was not entitled

to relief because he failed to prove that this error *necessarily* caused the non-promotion decision. Of course, since the grounds for decision of the Selection Boards are not divulged, it was impossible for petitioner to meet this burden. Understandably, petitioner cannot subscribe to the Army's assurance that his selection out was done on a "fair and equitable" basis. With the contraction of the armed services after the end of the war in Vietnam, more and more officers have been faced with problems similar to that of the petitioner, and challenges to the failure of the service to abide by statutes and regulations in administering the selection out process have been steadily increasing. See Order of Court of Claims of March 15, 1977, in *Sanders v. United States*, No. 157-74; Glosser and Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 Am. U.L. Rev. 391, 403 (1973). Accordingly, the issue as to the degree to which the services are bound by Congressional mandate for selection out and their own regulations implementing these statutory procedures has become increasingly significant. Especially in the light of the difference between the court below and the Court of Claims in their approach to this question, see *infra* pp. 14 - 15, it is important to a great number of military officers that this Court settle the procedures that must be followed to establish a fair and equitable procedure for promotion and elimination.

2. The decision of the court below is in conflict with the decisions of this Court. This Court has established the settled principle that the failure of a government agency to follow statutory procedures or its own regulations invalidates the agency's action. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States v. Shaughnessy*, 347

U.S. 260 (1945); *United States ex rel Johnson v. Shaughnessy*, 336 U.S. 806 (1949). The court below held that this principle does not apply to the Armed Services presumably because "personnel matters [are] better left in most cases to the discretion of the military." But the question before the Court was not a "personnel matter," but rather an issue of law as to the procedures required to be followed. Indeed, as we show below, the court below improperly entered into "personnel matters" by discussing not the legality of the procedure employed but rather the merits of petitioner's non-promotion.

3. The decision below is in conflict with decisions in the Court of Claims. The court below held that so long as petitioner was passed over by two properly constituted statutory selection boards, it did not matter that his record as submitted to those Boards was erroneous. This view is in conflict with the view expressed by the Court of Claims. As stated by the Court of Claims in *Weiss v. United States*, 408 F.2d 416 at 419 (1969) (emphasis supplied):

> "Selection Boards have and must have wide discretion in performing their duties. We do not think the courts are or should be in the 'promotion business'. *But the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record.*"

Judge Davis, concurring, added the following at 423:

> "I join in the court's opinion but would go further and hold explicitly that the Selection Board's action was invalid because it did not have the proper statutory 'record' before it. Also, I wish to reserve expressly (the court's opinion does so implicitly, I believe) the question whether a Correction Board proceeding can ever 'cure' a defective Selection Board determination in the sense that the Secretary could decide – as a result of a Correction Board proceeding which was free from the defects of the Selection Board – that the officer had been properly 'selected out'. The statute seems on its face to give this particular 'selecting out' power to a Selection Board, not the Secretary, and it may be doubted that an officer can ever be so separated except by the valid action of a Selection Board."

According to the majority opinion, "nothing conditions the validity of Selection Board proceedings upon the review of a perfectly compiled personnel file." (*Infra*, p. 18a.) If, by this language, the majority means that a file need not be free from technical or meaningless error, then we would have no quarrel with the statement. But, if, as appears from the context of this case, the majority is holding that Selection Board proceedings are valid even if they are based on files which contain material and significant errors, then the majority opinion is plainly wrong and is contrary to the view of the Court of Claims as expressed in *Weiss v. United States, supra; Yee v. United States*, 512 F.2d 1383 (1975); *Ricker v. United States*, 396 F.2d 454 (1968); *Duhon v. United States*, 461 F.2d 1278 (1972).

Both the District Court and the majority below explicitly recognized that the error in petitioner's file was material and that the military recognized it as such. (*Infra*, pp. 2a, 18a.) [2] Having determined that the error in

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[2] Cf. *Brooks v. United States*, U.S. Court of Claims No. 302-75, decided February 23, 1977, where the court said at slip opinion, p. 4: "It is also clear that an OER is considered to be the most important document in a selection folder."

petitioner's file was "material," the Army submitted petitioner's case to an Army Standby Advisory Board. But an Army Standby Advisory Board is not a statutory board (*Infra*, pp. 2a, 18a) and cannot be substituted for the Statutory Boards and the procedure provided by Congress, *Weiss v. United States, supra.*

4. Both the District Court and the majority below held that even though the Selection Boards failed to follow Army regulations, this error could be cured by presenting a correct file to the Army Board for the Correction of Military Records. (*Infra*, pp. 5a, 19a.) According to both opinions, the ABCMR is a "vital part of the promotion apparatus established by Congress." (*Infra*, pp. 5a, 19a.) But this misconceives the function and role of the Army Board for Correction of Military Records as related to Statutory Selection Boards. Congress did not vest the responsibility to determine whether or not petitioner should be promoted in the Army Correction Board; that responsibility is vested in Statutory Selection Boards. See Davis, J., concurring in *Weiss v. United States*, quoted *supra* pp. 14-15. And the role of those Statutory Selection Boards cannot be understated. According to the Army itself (emphasis supplied):

> "The law requires that the promotion of officers on active duty be made on a fair and equitable basis and that selection be based on ability and efficiency as well as seniority and age. *The selection of officers for promotion is accomplished by selection boards staffed with mature and experienced officers.* They review the overall record and manner of performance of each officer, and they compare his record with those of other officers being considered. Department of the Army does not prescribe specific qualifications necessary for promotion. Accordingly, no single factor is

> used by the selection board as a determinant for selection or non-selection for promotion. *The officers found best qualified are then recommended for promotion by the boards, and the Army places implicit faith in their findings.*"

Thus, an Army Correction Board composed of civilians is not a substitute for two statutory selection Boards "staffed with mature and experienced officers." And if those selection boards acted on an erroneously constituted statutory record, there is no substance to the contention that this error can be overlooked because the Correction Board had a proper record. Of course, the Army Correction Board was empowered to grant petitioner relief. (*Infra*, p. 19a.) But the issue before the Board on which relief depended was not whether or not petitioner should have been promoted, but rather whether or not the proceedings before the Statutory Selection Boards were tainted with error so as to require relief. Since, as found by the district court below, petitioner's "file as presented to the prior two Selection Boards was constituted in violation of Army regulations" (*infra*, p. 5a), the failure and refusal of the Army Board for Correction of Military Records to grant relief was certainly arbitrary and capricious.

5. In holding that the decision of the Army Correction Board was not arbitrary, capricious or otherwise unlawful, the majority relied on the findings and reasoning of the District Court. (*Infra*, p. 20a.) But the District Court upheld the decision of the Army Correction Board on the ground that petitioner had failed to carry the burden of showing that the error in his file "would *necessarily* lead to a non-promotion decision by a Selection Board." (*Infra*, p. 10a.) But this is an impossible and unfair burden to place on an officer. As stated by the Army:

> "Department of the Army does not prescribe specific qualifications necessary for promotion. . . ."
>
> * * *
>
> "The specific reasons for the decision of the selection board in any individual case are not known outside the board inasmuch as the board is not permitted to divulge such information."

In the light of the above, it was completely unreasonable to impose upon petitioner the requirement that he prove that the admittedly material errors in his file would *necessarily* have changed the Selection Board's decision. Petitioner is clearly entitled to relief on a showing that these errors are material and accordingly *could* have made a difference.

Moreover, the District Court based its finding that the error in petitioner's file would not *necessarily* have made a difference on its own examination of petitioner's file and its own determination that petitioner was not worthy of promotion as compared to his peers. (*Infra*, p. 9a.) But it was not the business of the District Court to review petitioner's Army record or to render a judgment as to whether or not petitioner merited a promotion. Its sole function was to determine whether or not the Army acted in accordance with statute and regulations. Having found that the Army did not (*infra*, p. 5a), it should have granted relief and not ventured into an inquiry as to whether or not petitioner merited a promotion.[3] By upholding the District Court, the majority in effect sanctioned an

[3]Curiously, in doing so, the District Court held that the opinion of the Chief of the Engineering Branch (that the invalid OER in petitioner's file was a significant and material error) should be given no weight since the promotion process was entrusted by Congress to Selection Boards.

invasion into an area courts have generally carefully warned against, i.e., the entrance of courts into the "promotion business."

The function of the courts in cases of this nature is not to enter into the "promotion business" but rather to hold the service to strict compliance with Congressional mandates and the service branch's own regulations. Cf. *Brenner v. United States*, 202 Ct. Cl. 678 (1973); *Boyd v. United States*, 207 Ct. Cl. 1 (1975).

6. Both the District Court and the Court of Appeals held that petitioner was not entitled to relief because he had failed to carry his burden of proving that the ABCMR had acted arbitrarily and capriciously. As we have shown, this conclusion rested on a misconception of the role of the ABCMR in the promotion process and a disregard of the Congressional decision vesting the authority to promote or not to promote in Selection Boards. But even if the ABCMR had a proper role in reviewing the refusal to promote petitioner, the procedures it employed were improper. The Board held no hearings, made no findings of fact and stated no reason for denying relief. It stated only the ritual formula that "insufficient evidence has been presented to indicate probable material error or injustice." Disposition of cases by such a ritual formula is a violation of the "simple but fundamental rule of administrative law" that a government agency must state the reasons for its decisions and facts relied upon. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Atchison, Topeka and Santa Fe Ry v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973) (Marshall J., plurality opinion). See also Davis, *Administrative Law* (3rd ed. 1972) at 320. As this Court has emphasized, "the orderly functioning of the process of review requires

that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).[4] Further, the decisions of the courts below that it will sustain a decision of the ABCMR in the absence of any findings of fact or statement of reasons is directly contrary to the holding of the Court of Claims, see e.g., *Beckham v. United States*, 392 F.2d 619 (1968).[5] And most significantly the Department of Defense has now conceded that Boards for the Correction of Military Records must make findings of fact and state the ground upon which relief was denied, and that such grounds must include a discussion of an applicant's claims. *Urban Law Institute of Antioch College v. Secretary of Defense*, Civ. A. No. 76-0530 (D. D.C. Jan. 31, 1977). See for a discussion of the case and the issues, Stichman, *Developments in the Military Discharge Review Process*, 4 Military Law Reporter 6001.

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[4]Arguably, since the decisions of Selection Boards are purely discretionary, they are not subject to the same requirement. However, if their discretionary judgments are not subject to review on the merits, it becomes all the more essential to require the Boards to adhere to the procedure prescribed by statute and regulations. *Brenner v. United States, supra, Boyd v. United States, supra.* And, of course, the issue before the ABCMR was not whether or not petitioner merited a promotion but rather whether his case had been decided in accordance with applicable statutes and regulations.

[5]The failure of the ABCMR to set forth any reasons for its decisions made it virtually impossible for the petitioner to meet the burden imposed upon him by the court to show that its decision was "arbitrary and capricous."

CONCLUSION

Certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJOR ADOLPH H. KNEHANS, JR., Plaintiff,	)	
v.	)	Civil Action
	)	No. 1978-73
HOWARD H. CALLAWAY,* Secretary of the Army, Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff, formerly a Major in the regular army, brought this action on October 30, 1973, to prevent his imminent honorable discharge from the Army. Prior to filing suit, plaintiff had twice been passed over for promotion by Selection Boards. By statute, a commissioned officer who has been passed over for promotion by two consecutive Selection Boards shall, if not eligible for retirement, be honorably discharged within seven months of the date that the Secretary approves the action of the second Selection Board. 10 U.S.C. §3303(d) (1970). Accordingly, plaintiff was ordered discharged on November 1, 1973.

Plaintiff's personnel file, when presented to both boards, was admittedly defective. Specifically, the file (1) contained a negative Officer Efficiency Report (OER) which was invalid, (2) did not contain several letters of recommendation and appreciation which

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*After the institution of this suit, Martin R. Hoffman became the Secretary of the Army. Pursuant to Rule 25(d), F.R.C.P., Hoffman is automatically substituted as a party.

plaintiff contends should have been included in his file, and (3) exhibited several letters of recommendation in the file which had not been stamped by the second Selection Board, which leads plaintiff to conclude that the second Selection Board did not consider those letters. On September 17, 1973, the Army voided and removed the negative OER from plaintiff's file, since plaintiff had not served under the supervision of the rating officer for the required 90 days. On October 2, 1973, the Army determined that removal of the negative OER constituted a "material change" in plaintiff's file, and accordingly referred his case to the Army Standby Advisory Board.[1] The Standby Advisory Board failed to recommend plaintiff for promotion on October 25, 1973.

This court denied plaintiff's application for a temporary restraining order on October 30, 1973, and then on April 18, 1974, remanded the case to the Army Board for the Correction of Military Records (ABCMR),[2] so that plaintiff could properly exhaust his administrative remedies. On November 6, 1974, the ABCMR "determined that insufficient evidence has been presented to indicate probable material error or injustice," and denied plaintiff's application for relief. Presently before the court are Cross-Motions for Summary Judgment.

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[1]The Army Standby Advisory Board is not a statutory board, as are the Selection Boards. The Standby Advisory Board was created by Army Regulation 624-100, ¶18(b), to afford promotion reconsideration "only in those cases where material error was present in the records of an officer when reviewed by a selection board."

[2]The ABCMR was created pursuant to 10 U.S.C. §1552(a) (1970). See 32 C.F.R. §581.3 (1975).

Plaintiff alleges several errors. First, he maintains that he was statutorily entitled to consideration by two Selection Boards, that consideration by the Selection Boards based upon a deficient file does not constitute the consideration to which he is entitled, and therefore that his discharge violates due process of law. Moreover, plaintiff contends that the failure of the Selection Boards, the Standby Advisory Board, and the ABCMR, to provide him with a prior hearing violates the due process clause of the Fifth Amendment. Defendant, on the other hand, contends that this court has no jurisdiction to review the actions of the Army which plaintiff complains of, and even if the court does have jurisdiction, it must uphold the finding of the ABCMR, since that action was not arbitrary and capricious. Finally, defendant argues that plaintiff has no recognized property or liberty interest in continued employment in the regular army, and therefore the due process clause does not apply to his discharge.

JURISDICTION

It is clear that this court has jurisdiction over plaintiff's complaint. Plaintiff alleges that the defendant violated 10 U.S.C. §3303 and his own regulations by permitting the Selection Boards to pass on his promotion based upon a defective file, and further that he violated the Fifth Amendment by not affording plaintiff a hearing before the various boards. Courts will not hesitate to review military action allegedly contrary to statute or regulation. *See Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Hodges v. Callaway*, 499 F.2d 417, 419 n.2 (5th Cir. 1974); *Peavy v. Warner*, 493 F.2d 748, 750 (5th Cir. 1974); *Denton v. Secretary of the Air Force*, 483 F.2d 21, 24-25 (9th Cir. 1973); *United States ex rel. Sledjeski v. Commanding Officer*,

478 F.2d 1147, 1150 (2d Cir. 1973). Moreover, while courts have made clear that they are not in the "promotion business," they have reviewed allegations that actions of Selection Boards in denying promotion have been procedurally irregular. *See Yee v. United States*, 512 F.2d 1383, 1387 (Ct. Cl. 1975); *Brenner v. United States*, 202 Ct. Cl. 678, 693 (1973); *Weiss v. United States*, 408 F.2d 416, 418 (Ct. Cl. 1969); *Ricker v. United States*, 396 F.2d 454, 457 (Ct. Cl. 1968). Finally, this court has jurisdiction over plaintiff's constitutional claim. *See Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

MERITS

Defendant has admitted that the invalid OER should not have been placed in plaintiff's file for consideration by the Selection Boards. Exhibit B at 10-11, Exhibit C at 22 to Defendant's Memorandum in Support of Motion to Dismiss, or in the Alternative for Summary Judgment. As a result, he directed the Standby Advisory Board to review the decisions of the Selection Boards. Neither the failure to include in plaintiff's file letters of commendation, nor the alleged failure of the second Selection Board to consider certain letters of commendation in his file, were stated as bases for assignment of the case to the Standby Advisory Board. Plaintiff, however, has pointed to no regulation requiring the Selection Board to stamp letters of commendation as an indication of consideration. In the absence of adequate proof to the contrary, the court will assume that the Selection Boards considered all the material in plaintiff's file. *See Brenner v. United States*, 202 Ct. Cl. 678, 690, 692 (1973). Further, the court will assume without deciding that failure to include certain letters of commendation in plaintiff's file

violated army regulations.[3] See footnote 4, *infra*. The first question before the court, therefore, is whether plaintiff is now entitled to reconsideration by two Selection Boards based upon a properly constituted file, in light of the fact that his file as presented to the prior two Selection Boards was constituted in violation of army regulations.

The thrust of plaintiff's argument is directed to the allegedly illegal actions of the Selection Boards. What plaintiff fails to recognize, however, is that the ABCMR is a vital part of the promotion apparatus established by Congress. 10 U.S.C. §1552(a) authorizes the Secretary of the Army "acting through boards of civilians of the executive part of that military department," to "correct any military record of that department when he considers it necessary to correct an error or remove an injustice." The Secretary may award back pay "if, as a result of correcting a record under this section, the amount is found to be due the claimant." 10 U.S.C. §1552(c) (1970). Finally, "without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or reappoint him to, the grade to which payments under this section relate." 10 U.S.C. §1552(d) (1970). Thus, Congress provided, at the Secretary's discretion, both an internal review of actions of Selection Boards and a comprehensive set of remedies. There is nothing to indicate that Congress contemplated that the ABCMR could not act through the Secretary to correct a failure by Selection Boards to follow Army regulations. Therefore, this court must agree with the Fifth Circuit that:

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[3] Army Regulation 624-100, ¶16(d) outlines procedures for inclusion of letters of commendation in an officer's file.

> It seems quite clear to us that the ABCMR can, if it determines that [plaintiff] has been illegally discharged, grant him full reinstatement and restoration of all rights, thus in effect making him whole for any injury he might suffer from a wrongful discharge. *Hodges v. Callaway*, 499 F.2d 417, 422 (5th Cir. 1974).

Thus, in order to grant plaintiff's requested relief, it is not enough to find that the Selection Boards violated Army regulations; the plaintiff must further show that the ABCMR acted arbitrarily and capriciously in failing to correct the error of the Selection Boards. *See Yee v. United States*, 512 F.2d 1383 (Ct. Cl. 1975).

In *Weiss v. United States*, 408 F.2d 416 (Ct. Cl. 1969), Weiss was discharged from the Navy after a Selection Board found that he had performed unsatisfactorily and would perform unsatisfactorily in a higher grade. In his file was a letter of reprimand and an unsatisfactory fitness report issued after an investigation into his alleged black market activities in the Philippines. All fitness reports prior and subsequent to the unsatisfactory report were said to be "outstanding," save one. According to Navy regulations, Weiss was permitted to respond in his file to all adverse fitness reports. He responded to the first report, but the Selection Board met and passed on his promotion before he could respond to the second. He appealed to the Board for the Correction of Naval Records (BCNR), the statutory equivalent of the ABCMR, which recommended reversal of the Selection Board's decision and removal of the letter of reprimand and first adverse fitness report. The Secretary of the Navy overruled the BCNR.

While at issue was the Secretary's authority to reverse the BCNR, the court did discuss what is meant by "record":

> The Congressional purpose would dictate that the "record" required to be furnished under that section be complete and not misleading.
>
> . . . .
>
> *The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record.* If a Service Secretary place before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes. We cannot endorse the way the law was complied with here. . . . 408 F.2d at 419 (emphasis added).

More recently, in *Yee v. United States*, 512 F.2d 1383 (Ct. Cl. 1975), the court found the action of the Air Force Board for the Correction of Military Records (AFBCMR), in not reversing plaintiff's discharge, to be arbitrary and capricious. Yee had been discharged in 1965 for reasons of temporary physical disability caused by an automobile accident. In 1970, the Assistant Secretary found that the 1965 discharge had been an injustice, reinstated Yee, and ordered that his records be corrected. There was an unexplained five year gap in his file, however, which apparently caused a Selection Board to pass over Yee for promotion in late 1970. The AFBCMR found this to be error, and ordered this pass over to be removed from Yee's files, but gave no order to place an explanation in Yee's files

as to the five year gap. Subsequently, two Selection Boards passed over him for promotion, actions which the AFBCMR upheld. The court stated:

> The AFBCMR knew in 1971 that plaintiff's name would again be submitted to a Selection Board on November 8, 1971, yet failed to insure that plaintiff's fate would not again be prejudiced by the same 5-year gap in his record. The Board further knew of the consequences of its silence when, in 1973, it reviewed plaintiff's case after two subsequent pass overs and a forced discharge. Yet the AFBCMR saw no reason to grant relief. 512 F.2d at 1388.

As a result, the court found, the AFBCMR acted arbitrarily and capriciously. The court then ordered that Yee be reinstated at his former rank with full back pay, and that his record be corrected to fully explain the gaps in his file. Egregious as was the action of the AFBCMR in permitting the Selection Boards to consider a defective file, the Court of Claims nonetheless found it to be a "close case." 512 F.2d at 1386.

Neither *Weiss* nor *Yee* require this court to find the ABCMR's action to be arbitrary or capricious. Most of the OERs, to be sure, are complimentary of plaintiff's performance. Complimentary language alone, however, could not support a finding by this court that the ABCMR acted arbitrarily or capriciously in not reinstating plaintiff.[4] First, the valid OERs in plaintiff's

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[4]The language in the letters of commendation which were not included in the file is no more complimentary than the language in the valid OERs. Their addition to the file, therefore, would have been merely cumulative in effect, and the ABCMR could rationally have concluded that their omission did not result in plaintiff's nonpromotion.

file show him to be on the same level of ability as the rest of his peers. Six of the seven OERs covering his regular army career found either the indorser, or the rater and indorser both, recommending no promotion ahead of his peers. Exhibit B, Defendant's Memorandum in Support of Motion To Dismiss or in the Alternative for Summary Judgment. The invalid OER likewise recommended no promotion ahead of his peers. Moreover, earlier in his career, plaintiff had received a similar negative report for his performance while stationed at Okinawa. Thus, even the file as defectively constituted still "fairly portrayed" plaintiff's record. *See Weiss v. United States*, 408 F.2d 416, 419 (Ct. Cl. 1969).

On June 15, 1972, prior to the action of the second Selection Board, plaintiff was informed by the Chief of the Engineering Branch of the Corps of Engineers that the negative OER was a significant item in his file. Plaintiff cited this letter to the ABCMR to support his contention that it was on the negative OER "that the two earlier non-selection decisions were made." Exhibit A to Defendant's Memorandum in Support of Motion to Dismiss, or in the Alternative for Summary Judgment, at 3-4. The letter however, makes clear that the Engineering Branch "[does] not participate in any promotion board process," and further, that the Engineering Branch was discussing why it – not the Selection Board – considered the negative OER to be significant. Exhibit A, *supra*, at 10a-b.

The record thus does not support the contention that the two non-selection decisions were caused by the negative OER. Other reports in the file could have prompted those decisions, and plaintiff's file cannot be characterized as so outstanding that any non-promotion

decision by the ABCMR would be arbitrary or capricious. In *Yee, supra*, it was quite obvious that a five year gap in an officer's file would *necessarily* require explanation before any Selection Board would consider his promotion. It is not so obvious that in the instant case the inclusion of the adverse OER and the absence of several letters of commendation would *necessarily* lead to a non-promotion decision by a Selection Board. As noted by General Putnam in his affidavit, in a postwar era, promotions traditionally slow down as the overall size of the Army is required to be reduced. Exhibit D to Defendant's Memorandum in Support of Motion to Dismiss or in the Alternative for Summary Judgment, ¶6. Plaintiff's record was very good, but it was not outstanding, and in the absence of evidence that inclusion of the negative OER necessarily caused the non-promotion decisions, this court cannot say that the ABCMR's refusal to reverse those decisions was without a rational basis.

DUE PROCESS CONTENTIONS

Plaintiff contends that because his discharge "carries with it damage to reputation [and] loss of salary and pension," a hearing is required before the Selection Boards and the ABCMR. Plaintiff's Brief in Support of Motion for Summary Judgment at 15. Moreover, he claims that he had "the expectancy after his long period (14 years) of service that he would hold his commission until retirement age." Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 2. Plaintiff thus attempts to establish that he has sufficient liberty and property interests to trigger application of the due process clause to his discharge. *See Board of Regents v. Roth*, 408 U.S. 564, 572, 576 (1972).

In *Roth, supra*, the Supreme Court delineated standards for determining whether a plaintiff possesses a sufficient property interest to require protection of the due process clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. 408 U.S. at 577.

Plaintiff's expectation that he would serve until retirement finds no support in the statute or regulations of the Army. 10 U.S.C. §3303 clearly states that an officer twice passed over for promotion "*shall* . . . be honorably discharged." Nowhere does the statute indicate that every commissioned officer can expect to serve until retirement. Thus, if plaintiff had such an expectation, it was, in the words of *Roth*, "unilateral," and not a property interest within the meaning of the due process clause. As the Fifth Circuit concluded in a case similar to this case, "One cannot create for himself a property by proclaiming its existence." *Sims v. Fox*, 505 F.2d 857, 862 (5th Cir. 1974) (en banc).

Nor is there sufficient liberty interest to require a due process hearing. Plaintiff has been granted an honorable discharge, the basis of which cannot be disclosed except upon request by the plaintiff, if he takes certain steps to ensure such non-disclosure. AR 635-5. In *Sims, supra*, an Air Force procedure similar to the Army procedure was dispositive of the issue whether plaintiff had a sufficient liberty interest in continued employment. 505 F.2d at 862-64. "The mere presence of derogatory information in confidential files is not an infringement of 'liberty.'" 505 F.2d at 863.

Moreover, plaintiff's discharge is described by AR 635-5 at "Involuntary Discharge – Failure of selection for permanent promotion – commissioned officers." This is no more "stigmatizing" – if it is stigmatizing at all – than nonretention for employment, which the Supreme Court in *Roth* found to be non-stigmatizing. 408 U.S. at 574 n. 13. No proof has been offered by plaintiff to support his alleged "loss of reputation," so this court need not decide whether loss of reputation, standing alone, would require application of the due process clause to plaintiff's discharge.

Finally, Army regulations do not require the ABCMR to hold a hearing on all applications for relief. Whether a hearing will be held is in the discretion of the ABCMR. 32 C.F.R. §581.3(c)(5) (1975). Since the regulations do not provide for a hearing, plaintiff is not entitled to one, unless the denial of a hearing is arbitrary or contrary to law. *Amato v. Chaffe*, 337 F. Supp. 1214, 1219 (D. D.C. 1972). This court has already determined that the final decision of the ABCMR was not arbitrary or capricious, and therefore the denial of a hearing was not arbitrary or contrary to law.

This court therefore holds that plaintiff had no right to a hearing before either the Selection Boards or the ABCMR.[5]

In light of the foregoing, and without a hearing pursuant to Local Rule 1-9(e), it is this 12th day of November, 1975

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[5] Plaintiff's argument that he was denied due process of law by the failure of the Army to grant him an appeal is patently frivolous, both on the facts and the law. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

ORDERED, that Defendant's Motion to Dismiss, or in the Alternative for Summary Judgment be and the same hereby is granted, and

FURTHER ORDERED, that plaintiff's Cross-Motion for Summary Judgment be and the same hereby is denied.

/s/
Chief Judge

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APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1126

MAJOR ADOLPH H. KNEHANS, JR., APPELLANT

v.

CLIFFORD L. ALEXANDER, Secretary of the Army

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 1978-73)

Argued February 28, 1977

Decided October 3, 1977

Joan Goldberg, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court with whom *David Rein* was on the brief, for appellant.

Jordan A. Luke, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Terry and *John R. Dugan*, Assistant United States Attorneys, were on the brief, for appellee.

Before: TAMM, ROBINSON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TAMM.

Dissenting opinion filed by *Circuit Judge* ROBINSON.

TAMM, *Circuit Judge*: Our appellant, former Major Knehans, was honorably discharged from the United States Army pursuant to 10 U.S.C. § 3303 (1970)[1] for having been twice passed over for promotion by a Statutory Selection Board. In order to prevent his imminent discharge, Knehans brought an action in the United States District Court for the District of Columbia to invalidate it on grounds of procedural noncompliance, alleging that submission of his defectively constituted personnel file had rendered the review to which he was statutorily entitled a nullity. After Knehans had exhausted his available administrative remedies by unsuc-

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[1] The pertinent provisions of this particular section read as follows:

> (a) In this subtitle, "deferred officer" means a promotion-list officer considered for promotion to the grade of captain, major, or lieutenant colonel under section 3299 of this title, but not recommended for promotion..
>
> * * * *
>
> (d) A deferred officer who is not recommended by the next selection board considering officers of his grade and promotion list shall—
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> * * * *
>
> (3) if he is not eligible for retirement under section 3913 of this title or any other provision of law, be honorably discharged on such date as may be requested by him and approved under regulations to be prescribed by the Secretary of the Army, but not later than the first day of the seventh calendar month after the Secretary approves the report of that Board
>
> . . . .

10 U.S.C. § 3303(a), (d)(3) (1970).

cessfully applying for relief from the Army Board for Correction of Military Records (ABCMR), *see generally id.* § 1552, the district court granted the Army's motion for summary judgment. *Knehans v. Callaway*, 403 F. Supp. 290 (D.D.C. 1975). This appeal promptly ensued, in which Knehans advances essentially two distinct arguments: (1) that by statute his discharge was conditioned upon his promotion having been properly considered by two Statutory Selection Boards and that consideration of his properly compiled file by an Army Standby Advisory Board was insufficient compliance with that condition; and (2) that he had a due process right to a hearing because his discharge implicated his constitutionally protected interests in "liberty" and "property". For the reasons which follow, we affirm.

We treat appellant's last contention first since it is the least compelling and may thus be disposed of expeditiously. Knehans asserts that "[a]lthough this court has advanced the view that a hearing is necessary where an officer suffers a loss of liberty, and damage to reputation and loss of employment is defined as liberty, the court below held otherwise." Appellant's Brief at 18. The short answer to this is that whatever "liberty" interest Knehans may have had in his reputation, *see Paul v. Davis*, 424 U.S. 693 (1976), has not been impinged by the mere fact of his honorable discharge and nonretention in the Army,[2] *see Board of Regents v. Roth*,

[2] Appellant characterizes the harm to his liberty as arising from a finding, in effect, that he was not "good enough" to be promoted. Appellant's Reply Brief at 12. This alleged "finding", which for purposes of this appeal we will accept as true, is hardly likely either to seriously harm this officer's reputational standing in his community or to foreclose his future opportunities to secure suitable gainful employment. *See generally* Mazaleski v. Treusdell, No. 75-1817 (D.C. Cir. Apr. 26, 1977), slip op. at 16-24. In this respect, appellant's reliance

408 U.S. 564, 572-75 (1972), especially since the reasons for his nonpromotion were never publicly disseminated, *compare* Appellant's Reply Brief at 13 *with Codd v. Velger*, 429 U.S. 624, 627-28 (1977) *and Bishop v. Wood*, 426 U.S. 341, 348-49 (1976), and, secondly, that he had no constitutionally protected entitlement to continued active duty as a commissioned officer in the Army since, absent more, any objectifiable expectancy supporting such an entitlement was sufficiently negated by the express provisions of 10 U.S.C. § 3303 (1970).[3] *See generally Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972). In sum, we find no reason whatsoever to fault the district court's analysis of appellant's procedural due process claims based on asserted liberty and property interests.

As to appellant's other argument, it is undisputed that both Selection Boards reviewed a personnel file on appellant which in certain respects was not strictly in accord with Army directives. Knehans views this oversight as automatically voiding his discharge and, at the same time, as entitling him to retention in the service at least until two new Selection Boards have been convened at one-year intervals to consider his promotability on the basis of a proper file. Fortunately, we are not required by the circumstances presented here to accept this extreme position, interfering as it would with personnel matters better left in most cases to the discretion of the military, *compare Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) *with Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir.

upon *Rolles* v. *Civil Service Commission*, 512 F.2d 1319 (D.C. Cir. 1975), involving charges that amounted to accusations of dishonesty, is clearly inapposite.

[3] Nor does his longevity in the armed forces suffice by itself to create such an interest. *See, e.g.*, McNeill v. Butz, 480 F.2d 314, 320-21 (4th Cir. 1973). *See also* Perry v. Sindermann, 480 U.S. 593, 601-02 (1972).

1971), for he is entitled to no such relief either by statute or regulation.

Evincing some confusion on this point, appellant asserted in his brief that "[i]t is admitted herein that appellant has not been passed over by two statutory selection boards. . . ," Appellant's Brief at 10, which of course is incorrect for he quite certainly had been. It is true that subsequent to these two nonpromotion decisions the Army determined that one of several Officer Efficiency Reports had been improperly included in the review file [4] and that several letters of commendation which should have been included therein had not been.[5] Such a showing of error, however, does not nullify the Selection Boards' proceedings nor requires that appellant once again be considered by two separate ones, for nothing conditions the validity of Selection Board proceedings upon the review of a perfectly compiled personnel file. Though Army regulations do specify what documents are properly contained in an officer's selection file, AR 624-100 ¶¶ 16-17; J.A. 82-83, those same regulations provide:

> Selection board action is administratively final. Reconsideration for promotion will be afforded only in those cases where material error was present in the records of an officer when reviewed by a selection board. This determination will be made by Headquarters, Department of the Army.

Id. ¶ 18(b); J.A. 83. Thus, in this instance, appellant must take "the bitter with the sweet", and the fact that the Secretary of the Army subsequently directed a Standby Advisory Board [6] to evaluate the corrected file vis-à-

[4] *See* 403 F. Supp. at 295.

[5] *See id.* & n.4.

[6] The Army Standby Advisory Board is a creature of regulation, AR 624-100, ¶ 18(b), rather than statute in contrast to the Selection Boards. *See generally* Ford, *Officer Selection Boards and Due Process of Law*, 70 MIL. L. REV. 137, 151-52 (1975).

vis a pool of others was simply an act of administrative grace about which appellant can scarcely complain.

By the same token, appellant's challenge to the ABCMR's proceedings [7] is, at bottom, irreconcilable with a long line of precedent in this circuit and others that, subject to certain exceptions inapplicable here, an aggrieved military officer must first exhaust his administrative remedies before his particular service's Board for Correction of Military Records prior to litigating his claims in a federal court. *See, e.g., Horn v. Schlesinger*, 514 F.2d 549, 551 (8th Cir. 1975); *Sohm v. Fowler*, 365 F.2d 915 (D.C. Cir. 1966); *McCurdy v. Zuckert*, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966). *Compare Ogden v. Zuckert*, 298 F.2d 312 (D.C. Cir. 1961). This rule must logically rest on the proposition that such a Correction Board, charged with a responsibility to "correct an error or remove an injustice," 10 U.S.C. § 1552(a) (1970), has by implication sufficient authority to provide the relief appellant now seeks: full reinstatement and backpay. *See, e.g., Hodges v. Callaway*, 499 F.2d 417, 422 (5th Cir. 1974); *Sohm, supra*, 365 F.2d at 917; *Ogden, supra*, 298 F.2d at 317-18 (Burger, J., dissenting); *Caddington v. United States*, 178 F. Supp. 604 (Ct. Cl. 1959). *See also* 10 U.S.C. § 1552 (d) (1970).

In this respect, the Army's Correction Board is, as the district court properly characterized it, "a vital part of the promotion apparatus established by Congress," 403 F. Supp. at 294; *see Horn, supra*, 514 F.2d at 552; *Hodges, supra*, 499 F.2d at 422, and appellant must

[7] Appellant asserts further that the ABCMR gave no reason for its decision so that a reviewing court cannot know whether the basis for its decision not to recommend reinstatement was a proper one. Again, however, appellant's assertion departs rather substantially from reality. *See* J.A. 59, *quoted in* 403 F. Supp. at 292.

show that *its* decision not to reinstate him on the basis of a corrected file was arbitrary, capricious or otherwise unlawful. *See, e.g., Horn, supra,* 514 F.2d at 553 & n.14; *Yee v. United States,* 512 F.2d 1383, 1386 (Ct. Cl. 1975). The district court concluded that he had failed to sustain his burden of proof in this regard, and we fully agree. *See Mindes v. Seaman,* 501 F.2d 175, 176 (5th Cir. 1974).

Not finding any of appellant's other arguments meritorious, the summary judgment awarded by Judge Jones is hereby

Affirmed.

ROBINSON, *Circuit Judge,* dissenting: I cannot accept the court's conclusions that the selection boards' consideration of appellant's improperly-constituted personnel file was not harmful error and that the failure of the Army Board for Correction of Military Records to reinstate appellant was not arbitrary. For reasons to be expressed, I would reverse the District Court's judgment and remand the case for a determination of whether the evidence establishes a substantial probability of prejudice emanating from the selection boards' proceedings.[1] That disposition of the case would incidentally eliminate, at least temporarily, the necessity of passing on appellant's due process claims—a bonus we should be eager to realize.[2] Because, however, my colleagues have treated the due process contentions unsatisfactorily, I feel obliged to comment upon them briefly.[3]

I

As stated in the majority opinion, appellant was honorably discharged from the United States Army pursuant to Section 3303,[4] which specifies that course for a commissioned officer who has not been recommended for promotion by either of two consecutive selection boards and who is not eligible for retirement. Although Section 3303 expressly conditions discharge on consideration for promotion by two selection boards functioning in direct succession, the statute applicable to Army selection board proceedings does not elaborate the elements of a candidate's record that must or must not be evaluated.[5] By

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[1] Part II *infra.*

[2] Compare, *e.g., Langston* v. *Johnson,* 156 U.S.App.D.C. 5, 7, 478 F.2d 915, 917 (1973), and cases cited at notes 7-8 thereof.

[3] Part III *infra.*

[4] 10 U.S.C. § 3303 (1970).

[5] The statute simply authorizes the Secretary of the Army to furnish to the board the names of officers to be considered for promotion. 10 U.S.C. § 3300(a)(1), (b)(1), (c) (1970).

implementing regulations, however, the Army has ruled certain materials admissible[6] and certain others inadmissible in a selection board proceeding.[7]

Appellee, the Secretary of the Army, admits, and the District Court assumed in reaching its decision,[8] that con-

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[6] Army Reg. 624-100 ¶ 16(d), Joint Appendix (J.App.) 82, provides for inclusion of letters of recommendation in a candidate's file:

> *Communications for selection boards.* No officer is authorized to appear in person before a selection board on his own behalf or in the interest of another officer who is in a zone of consideration.
>
> (1) An officer within a zone of consideration may write a letter to the selection board inviting attention to any matter of record in the Department of the Army concerning himself that he feels important in the consideration of his record. However, a commissioned officer being considered for Regular Army promotion will forward such letter through the appropriate Career Branch to the selection board (10 U.S.C. 3297(e)).
>
> (2) Letters of commendation or appreciation and recommendations for promotion may be forwarded direct to the selection board.
>
> (3) Communications which contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to a selection board.
>
> (4) Request for corrective special review of specific efficiency reports will not be included in letters directed to the selection board but may be forwarded to The Adjutant General, ATTN: AGPB-FP Department of the Army, Washington, D.C. 20315. . . .

[7] See note 6 *supra* and letter from Major J. Stone, Evaluation Report Branch, to Major Adolph H. Knehans, Jr. (Sept. 17, 1973), J.App. 15 (advising that an efficiency report had been voided and removed from appellant's records because he had served under the supervision of the rating officer for less than ninety days).

[8] *Knehans* v. *Callaway*, 403 F.Supp. 290, 293 (D.D.C. 1975).

trary to the regulations several letters commending appellant were omitted from the record reviewed by the selection boards, and that an officer efficiency report inadmissible under the regulations was considered by the boards. Because under well-settled principles a governmental agency is legally bound to adhere to its own regulations,[9] the omission of the letters of commendation and the inclusion of the efficiency report rendered appellant's file clearly defective.

Although my colleagues apparently concede this point, they opine that the validity of selection board proceedings does not depend upon review of a perfectly constituted personnel file. With this observation I fully agree. But the question here is not whether any imperfection in a candidate's personnel file examined by a selection board fatally taints that proceeding. Rather, the issue is whether the mistake admittedly accompanying consideration of appellant's file was sufficiently severe to merit remedial measures. If the Army's blunder was in fact injurious to appellant, evaluation by the Army of the corrected file was mandatory, not simply an "act of administrative grace" as the court asserts. As will be developed, I believe the evidence suggests a grave likelihood of prejudicial error.[10]

II

Admittedly, the District Court's function was not to review directly the determinations of the two selection boards that evaluated appellant's record, but to review

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[9] *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Hammond* v. *Lenfest*, 397 F.2d 705 (2d Cir. 1968); see *Dunmar* v. *Ailes*, 121 U.S.App.D.C. 45, 348 F.2d 51 (1965).

[10] Part II *infra*.

the decision of the Army Board for Correction of Military Records (ABCMR) refusing to reinstate him. The ABMCR concluded that "insufficient evidence ha[d] been presented to indicate probable material error or injustice." [11] The District Court held, and my colleagues now affirm without discussion, that the ABCMR's decision was not arbitrary.

I believe, however, that the District Court was overly deferential in its review of the ABCMR's decision. The court observed:

> It is not so obvious that in the instant case the inclusion of the adverse OER and the absence of several letters of recommendation would *necessarily* lead to a non-promotion decision by a Selection Board. . . . [I]n the absence of evidence that inclusion of the negative OER necessarily caused the non-promotion decisions, this court cannot say that the ABCMR's refusal to reverse those decisions was without a rational basis.[12]

Certainly, if a defect in a candidate's file "necessarily" would preclude his promotion, the defect would be harmful, and the ABCMR's failure to remedy it clearly would be reversible.[13] But even short of this, the ABCMR just as clearly would violate its duty to remove injustices and correct errors in servicemen's records [14] if it refused to rectify a mistake that likely prevented promotion. Thus, the District Court should have undertaken to ascertain whether a substantial threat of prejudice was established by the evidence, and if it was the ABCMR's refusal to reinstate should have been reversed as arbitrary.

In fact, the evidence raises serious doubts regarding the soundness of the ABCMR's determination. We are

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[11] Quoted by the District Court, *Knehans* v. *Callaway*, *supra* note 8, 403 F.Supp. at 292.

Appellant argues that the ABCMR's holding is inconsistent with the Army's prior finding that inclusion of the defective efficiency report in his file was "material error" for purposes of invoking review by the Standby Advisory Board under Army Reg. 624-100 ¶ 18(b), J.App. 83. The Army's position, however, is not necessarily self-contradictory. The efficiency report was voided and removed from appellant's files without regard to its contents, see note 7 *supra*. Under Army policy, "material error" for purposes of Advisory Board review exists whenever a "major change is made to an efficiency report that was seen by a selection board." Letter from Lieutenant Colonel James C. McCoy, Chief, Promotion Branch, to Joel W. Collins, Jr. (counsel for appellant) (Aug. 2, 1973), J.App. 16. Advisory Board review, therefore, may be necessitated by elimination of an efficiency report from an officer's file, after the report has been viewed by a selection board, even though the presence of the report in the file would not have jeopardized the officer's chances for promotion.

[12] *Knehans* v. *Callaway*, *supra* note 8, 403 F.Supp. at 296 (emphasis in original).

[13] See *Yee* v. *United States*, 512 F.2d 1383 (Ct. Cl. 1975). Because the error in *Yee* was egregious, that decision would not require reversal on the facts of the present case, but it surely would not preclude it.

[14] See 10 U.S.C. § 1552 (1970); *Yee* v. *United States*, *supra* note 13, 512 F.2d at 1387. In *Reale*, 208 Ct. Cl. 1010, 1011 (1976), the court observed:

> The Board is to recommend action to correct "error" or "injustice," 10 U.S.C. § 1552. The two things are not the same. "Error" means legal or factual error. Normally, it is such that a court of law could correct it whether the soldier or sailor had first applied to a Correction Board, or not. If the Board when asked, fails to correct such an "error", courts will correct it on judicial review. "Injustice," when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal. *Yee* v. *United States*, 206 Ct. Cl. 388, 512 F.2d 1383 (1975).

The Army's transgression of its own regulations in this case, of course, constitutes legal error. See note 9 *supra* and accompanying text.

told that the defective efficiency report indicated a downward trend in appellant's performance,[15] and that could have been critically important to the decision of the selection boards, especially in view of the District Court's finding that appellant's record was otherwise "very good." [16] Moreover, the Chief of the Engineering Branch of the Corps of Engineers informed appellant by letter after the action of the first selection board that the efficiency report was a significant item in his file.[17] Although the letter indicated that the Engineering Branch did not participate in the decisionmaking process, its opinion bears on the materiality of the report; the Engineering Branch, in which appellant sought advancement, certainly was familiar with the considerations relevant to caliber of performance within that branch. In support of the decision of ABCMR, the District Court noted a similar negative report that appellant had received earlier in his career regarding his performance while stationed in Okinawa.[18] Yet, such a report would not diminish the impact of the more recent but defective efficiency report since the mere existence of the second adverse report suggested continued inefficiency, which qualitatively altered the character of appellant's records.[19]

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[15] Brief for Appellant at 6-7.

[16] *Knehans* v. *Callaway*, *supra* note 8, 403 F.Supp. at 296.

[17] *Id.* at 295-296.

[18] *Id.* at 295.

[19] See Department of the Army, Promotion of Officers on Active Duty, app. §§ 3, 6, J.App. 88-89. Section 3 provides:

> The basic and most important single document in the officer's record is the efficiency report. The Manner of Performance section in each report must be closely examined. It is here that a pattern of strengths and weaknesses over a period of time will appear. . . . With each passing year the OEI, last computed in 1961, has less and less importance. . . .

[Continued]

The District Court also concluded that the letters of commendation erroneously omitted from appellant's file were no more laudatory than the valid efficiency reports present in the file. Because the letters were therefore "cumulative in effect," the court held that the ABCMR "could rationally have concluded that their omission *did not result* in [appellant's] nonpromotion." [20] Even if the omission of the letters of commendation from appellant's file would not inexorably have precluded a favorable decision by the selection boards, it may have contributed to the Boards' nonpromotion decision significantly since the omitted letters manifested more universal approval of appellant's performance. Thus, in light of the doubts raised by the evidence, I would remand this case to the District Court for reevaluation of the question of prejudice by the less restrictive standard of substantial probability as opposed to necessary effect.[21]

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[19] [Continued]

See also Letter from Colonel Joseph A. Jansen, Chief, Engineer Branch, to Major Adolph H. Knehans, Jr. (June 15, 1972), J.App. 64.

[20] *Knehans* v. *Callaway*, *supra* note 8, 403 F.Supp. at 295 n.4 (emphasis supplied).

[21] In the event that prejudice is found, the further question would be whether the reconsideration for promotion afforded by the standby advisory board remedied the error. The standby advisory board is not a statutory body, and the Secretary has expressly disclaimed reliance upon the standby advisory board as a qualified substitute for the statutory selection boards, or upon action of the standby advisory board as a legally acceptable compliance with the statutory requirements for discharge. Brief for Appellee at 19-20. The Secretary does contend, however, that "it is fairer to afford promotion reconsideration by having a standby advisory board consider the officer under the same criteria [and in comparison to a sample of the same candidates] which the statutory Selection Board previously considered." *Id.* at 11 n.11. Otherwise, the officer would have to compete with a different, and perhaps better qualified, group of officers. *Id.* If standby advisory board

III

On my view of this case, I would not reach appellant's Fifth Amendment due process contentions. Because, however, my colleagues have addressed the due process issues, and from my standpoint have resolved them unsatisfactorily, I am constrained to add a few remarks of my own.

First, unlike the majority, I am not at all convinced that appellant's claim of loss of liberty without due process can be "disposed of expeditiously." Appellant's discharge has not seriously damaged his "standing and associations in his community," [22] and he would not be entitled to due process protection on that basis. But in *Roth* [23] the Supreme Court recognized a second prong to the liberty-interest test in cases involving termination of employment. The Court held that governmental action that forecloses a range of employment opportunities deprives the affected person of a liberty interest:

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action were designed solely to afford an officer the possibility of immediate relief from prejudicial error such action could indeed only benefit the officer; but an adverse ruling by an advisory board should not be used to cut off an officer's statutory right to *proper* consideration by two statutory boards. If an officer seeks reconsideration by two statutory boards after having been wrongfully denied promotion by two selection boards and denied relief by a standby advisory board, the Army can hardly refuse to afford the officer such reconsideration on the ground that it would be unfair to the officer to do so. If the officer wishes to take his chances in a pool of potentially better candidates, that is his indubitable statutory right. If the subsequent pool of candidates for promotion is less qualified than the affected officer, the Army cannot deny the officer the advantage of consideration in that pool, which was necessitated by the Army's own serious error; nor would the Army have an interest in doing so, because thereby it would lose an admittedly superior officer.

[22] *Board of Regents* v. *Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 558 (1972).

[23] *Board of Regents* v. *Roth*, *supra* note 22.

> [T]he State . . . did not invoke any regulations to bar the respondent [an assistant college professor] from all other public employment in state universities. Had it done so, this . . . would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . ." [24] [A] state, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] Due Process," [25] . . . and specifically, in a manner that denies the right to a full prior hearing.[26]

In the present case, the effect of appellant's discharge was not only to terminate his active duty in the Regular Army but also to prevent his reentering on active duty as a reserve officer.[27] Appellant argues with some force that civilian work in the general area of his expertise and experience is qualitatively different from employment as an officer in the Army.[28] Thus, appellant raises a substantial claim that his discharge pursuant to Section 3303 effected a deprivation of his liberty to pursue a range of

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[24] Here citing *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817, 861 (1951) (Jackson, J. concurring).

[25] Here citing *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 I.Ed.2d 796, 801 (1957) (petitioner was not permitted to take the New Mexico bar examination and was thereby prevented from practicing law in New Mexico).

[26] 408 U.S. at 573-574, 92 S.Ct. at 2707, 33 L.Ed.2d at 559, last citing *Willner* v. *Committee on Character*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 229 (1963) (petitioner passed the New York bar examination but was not admitted to the New York Bar).

[27] Letter from Colonel Robert J. Kirk, Deputy Director, Personnel Actions and Records, to Major Adolph H. Knehans, Jr. (Sept. 17, 1973), J.App. 71.

[28] Reply Brief for Appellant at 14.

professional opportunities, thereby entitling him to due process protection.

Second, although I agree with my colleagues that appellant has not established the existence of the property interest requisite, I believe their formualtion of this issue is inadequate. Contrary to their assertion, an objectifiable expectancy supporting an entitlement to continued duty as a commissioned Army officer was not necessarily negated by Section 3303. That provision authorizes discharge only if an officer is not recommended for promotion by two successive selection boards. Hence, an officer cannot be discharged under Section 3303 unless he is twice determined to be nonpromotable. This, without more, does not negate a legitimate claim of entitlement.

Section 3303, however, does not independently establish entitlement to continued employment because nothing therein suggests that the determinations of the selection boards are to be more than discretionary. The Army has promulgated criteria and guidelines to govern deliberations of selection boards,[29] but they are not inclusive. A selection board need not base its decision on any single factor and no specific qualifications are essential to promotion.[30] Thus, a candidate apparently cannot be assured

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[29] Department of the Army, Promotion of Officers on Active Duty (especially Appendix, "Guidance for Promotion Selection Boards"), J.App. 78-90.

[30] Letter, *supra* note 11, J.App. 16. Although the existence of discretionary authority to discharge or to deny promotion does not per se raise constitutional problems, the improper exercise of such discretion may well violate equal protection guarantees found in the Fifth and Fourteenth Amendments. See *Schware* v. *Board of Bar Examiners*, *supra* note 25, 353 U.S. at 239, 246, 77 S.Ct. at 756, 760, 1 L.Ed.2d at 801-802, 805; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). See generally *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

of a recommendation for promotion by satisfying any particular group of criteria.[31] Because a selection board's promotion decision involves so broad a range and so high a degree of discretion, an officer has no protected property interest in his Army officership.

These, then, are my thoughts on the constitutional aspects of this case. To repeat, I express them only to repel any notion that I concur in those advanced by my colleagues. As previously indicated, had my view of the case prevailed, we would simply reverse the District Court's judgment and remand for reconsideration on the issue of prejudicial error without reaching the constitutional questions at this time.

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[31] Compare *Bishop* v. *Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (city ordinance provided that a permanent city employee might be discharged if his work is substandard, or if he is negligent, inefficient or unfit to perform his duties, but the Court refused to read the ordinance as prohibiting discharge for any other reason and as thus conferring tenure on permanent employees), with *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (eligibility criteria for welfare benefits gave rise to entitlement to benefits for those who satisfied those criteria).

APPENDIX C [Filed Oct 3 1977]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1126 September Term, 1977

Major Adolph H. Knehans, Jr., Civil 1978-73
Appellant

v.

Clifford L. Alexander, Secretary
of the Army

Appeal from the United States District Court for the District of Columbia. Before: TAM, ROBINSON and ROBB, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: October 3, 1977
Opinion for the Court filed by Circuit Judge Tamm
Dissenting Opinion filed by Circuit Judge Robinson

APPENDIX D

[Filed Nov 3 1977]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1126 September Term, 1977

Major Adolph H. Knehans, Jr., Civil Action #1978-73
Appellant

v.

Clifford L. Alexander, Secretary
of the Army

BEFORE: Tamm, Robinson and Robb, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellant herein, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Robinson would grant appellant's petition for rehearing.

No. 77-1081

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLPH H. KNEHANS, JR., PETITIONER

v.

CLIFFORD L. ALEXANDER, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-31a) is reported at 566 F. 2d 312. The opinion of the district court (Pet. App. 1a-13a) is reported at 403 F. Supp. 290.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on October 3, 1977. A timely petition for rehearing was denied on November 3, 1977 (Pet. App. 34a). The petition for a writ of certiorari was filed on January 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was discharged from the Army in violation of 10 U.S.C. 3303(d).

2. Whether the decision of the Army Board for the Correction of Military Records not to grant relief to petitioner was arbitrary and capricious.

STATEMENT

Petitioner, while a major in the Army, was twice passed over for promotion by Army selection boards, making him subject to mandatory discharge. 10 U.S.C. 3303(d). Petitioner filed an appeal, contesting the placement in his file of an adverse Officer Efficiency Report (OER). The appeal was successful and the report was removed from petitioner's records, because petitioner had not served for at least 90 days under the supervision of the rating officer (Pet. App. 2a). A Standby Advisory Board, created by the Secretary of the Army to reconsider the promotion of officers whose other selection procedures were flawed, then considered petitioner for promotion on the basis of his corrected file but did not recommend his promotion (*ibid.*).

Petitioner filed suit in the United States District Court for the District of Columbia, asking the district court to vacate the selection boards' decisions and to order him reinstated while the Army resubmitted his case to the next two selection boards convened. The district court held that petitioner must exhaust his administrative remedies

by filing an application with the Army Board for the Correction for Military Records (ABCMR);[1] it remanded the case to the ABCMR (Pet. App. 3a).[2]

The ABCMR denied petitioner's application for relief on the ground that " 'insufficient evidence has been presented to indicate probable material error or injustice' " (Pet. App. 2a), and the case was returned to the district court. The district court granted summary judgment for the Army, holding that the ABCMR had not acted arbitrarily and capriciously. The court concluded that petitioner's file "even * * * as defectively constituted still 'fairly portrayed' [petitioner's] record" (*id.* at 9a) and that the record before the court "does not support the contention that the two non-selection decisions were caused by the negative OER" (*ibid.*). The court explained that "in the absence of evidence that inclusion of the negative OER necessarily caused the non-promotion decisions, this court cannot say that the ABCMR's refusal to reverse those decisions was without a rational basis" (*id.* at 10a).

A divided panel of the court of appeals affirmed, holding that because the ABCMR has "sufficient authority to provide the relief [petitioner] now seeks" (Pet. App. 19a), petitioner must show that its decision not to reinstate him was arbitrary, capricious or otherwise unlawful. "The district court concluded that he had failed to sustain his burden of proof in this regard," said the court, "and we fully agree" (*id.* at 20a).

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[1]The ABCMR is a board of civilians established by the Secretary of the Army pursuant to 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." The ABCMR had authority to grant petitioner full relief (Pet. App. 5a-6a, 19a).

[2]Petitioner's request for an order temporarily restraining the Army from discharging him was denied, and petitioner was discharged.

ARGUMENT

1. It has been the consistent policy of the federal courts to leave internal military decisions undisturbed, absent a showing of significant illegality. *Schlesinger* v. *Ballard*, 419 U.S. 498; *Gilligan* v. *Morgan*, 413 U.S. 1; *Orloff* v. *Willoughby*, 345 U.S. 83. Promotion decisions are particularly inappropriate for judicial oversight. *Mindes* v. *Seaman*, 501 F. 2d 175 (C.A. 5); *Payson* v. *Franke*, 282 F. 2d 851 (C.A. D.C.), certiorari denied *sub nom. Robinson* v. *Franke*, 365 U.S. 815. Petitioner has not demonstrated that the inclusion of one particular OER in his file—an inclusion improper only because the reviewing officer had not been his superior officer for the required 90 days—so infected the selection process with error that the courts must intervene.[3]

As the court of appeals correctly held, there is no statutory or regulatory requirement that a selection board review a perfectly constituted file. The actions of a military promotion board have been held invalid only where the board was illegally constituted and thereby lacked jurisdiction over the matter. See *Ricker* v. *United States*, 396 F. 2d 454 (Ct. Cl.). If the board is properly constituted, and the documents it possesses are "substantially complete, and * * * fairly portray the officer's record" (*Weiss* v. *United States*, 408 F. 2d 416, 419 (Ct. Cl.)), the officer has received his due. The district court and the court of appeals found that petitioner's file met this test, and there is no reason for this Court to review that essentially factual conclusion.

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[3]Both the district court and the court of appeals rejected petitioner's constitutional arguments, which he does not press here (Pet. App. 10a-12a, 16a-17a).

Petitioner's argument (Pet. 13-16) that the selection boards' proceedings are vitiated because the presence of the invalid OER violated the Army's own regulations is insubstantial. Petitioner focuses exclusively on paragraph 17 of Army Regulation 624-100, which describes documents to be included before the selection boards, and ignores paragraph 19 of the same regulation, which provides (Pet. App. 18a):

> Selection board action is administratively final. Reconsideration for promotion will be afforded only in those cases where material error was present in the records of an officer when reviewed by a selection board. This determination will be made by Headquarters, Department of the Army.

The Secretary of the Army created a Standby Advisory Board to evaluate corrected files in cases such as petitioner's. Petitioner's corrected file was reconsidered by the Standby Advisory Board. That board declined to recommend him for promotion. The procedures followed in petitioner's case therefore conformed to Army regulations, and petitioner's discharge was valid. The court of appeals properly concluded that the original "oversight" in this case did not amount to a violation of either statute or regulation and was not sufficiently prejudicial to justify departure from the established judicial policy of non-interference with "personal matters better left in most cases to the discretion of the military * * *" (Pet. App. 17a-18a).

Petitioner is incorrect in his contention (Pet. 14-16) that the decision here conflicts with decisions of the Court of Claims. In *Weiss* v. *United States, supra*, the Court of Claims held that the Navy's reversal of the decision of its Board for the Correction of Naval Records was arbitrary and capricious because the undersecretary improperly

relied on the advice of the Judge Advocate General of the Navy, in violation of the requirement of 10 U.S.C. 1552 that a service secretary "act through" civilian boards to correct records.[4] In *Yee* v. *United States*, 512 F. 2d 1383 (Ct. Cl.) and *Duhon* v. *United States*, 461 F. 2d 1278 (Ct. Cl.), the correction boards permitted undisputedly prejudicial error to remain uncorrected. But the "oversight" in the present case was corrected promptly when the Army voided and removed the objectionable OER from petitioner's file; no admittedly prejudicial error has gone uncorrected.

2. Finally, petitioner argues (Pet. 19-20) that the ABCMR's failure to make formal "findings of fact or [give any] statement of reasons" renders its decision arbitrary and capricious.

This contention is raised for the first time before this Court and for that reason should not be considered. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. See also *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 6; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. No exceptional circumstances in this case justify review. Army regulations in effect at the time of petitioner's application for relief provided that a written statement of the reasons for decision and the facts relied upon were not required whenever relief was denied without a hearing, as occurred in the instant case. 32 C.F.R. 581.3(c)(iii)(1976).[5]

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[4] *Weiss* stated standards for the review of contents of the files before selection boards. For the reasons given above and at Pet. App. 6a-9a, the file in petitioner's case was not inadequate under those standards.

[5] The regulations have been changed; effective April 1, 1977, 42 Fed. Reg. 17441, on every application denied with or without a hearing, the determination of the Board "shall be made in writing and include a brief statement of the grounds for denial." 32 C.F.R. 581.3(c)(5)(iv)(1977). The fact that the regulations were revised

The Administrative Procedure Act requires a written statement of "findings and conclusions, and the reasons or basis therefore" (5 U.S.C. 557(c)(3)(A)), only for rulemaking proceedings (see 5 U.S.C. 553) and adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (see 5 U.S.C. 554(a)). The statutory requirement of formal findings does not apply here because the ABCMR is not required by statute to provide applicants with an opportunity for a hearing. See 10 U.S.C. 1552.

This Court has not required detailed findings of fact and conclusions of law unless required by statute or regulation, or unless effective judicial review would be impossible in their absence. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 191-192; *Camp* v. *Pitts*, 411 U.S. 138; *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

At all events, the ABCMR did provide a reason for its decision—that " 'insufficient evidence has been presented to indicate probable material error or injustice' " (Pet. App. 2a). Although brief, the explanation states the reason for the action taken and is tantamount to a finding that the invalid OER was not a significant factor in the selection boards' decisions to pass over petitioner for promotion.[6]

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renders petitioner's arguments regarding the need for this Court to "settle the procedures that must be followed to establish a fair and equitable procedure for promotion and elimination" (Pet. App. 13) even less compelling; whatever difficulties flowed from a lack of stated reasons will not arise in the future.

[6] Petitioner also contends that "it was not the business of the District Court to review petitioner's Army record or to render a judgment as to whether or not petitioner merited a promotion" (Pet. 18). In applying the arbitrary and capricious standard, however, this Court has stated that the administrative record is "the focal point for judicial review * * *." *Camp* v. *Pitts*, *supra*, 411 U.S. at 142.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

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